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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re T.D., a Person Coming Under the
Juvenile Court Law.

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

L.R., JR.,

Defendant and Appellant.

B206407

(Los Angeles County
Super. Ct. No. CK58349)

APPEAL from orders of the Superior Court of Los Angeles County,
Sherri Sobel, Referee. Affirmed in part; reversed in part.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and
Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County
Counsel, Kirstin J. Andreasen, Associate County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Father appeals adjudication and disposition orders in his daughter's dependency case. Father makes no claim of error regarding the jurisdictional order as to Mother pursuant to Welfare and Institutions Code section 300, subdivision (j),¹ and we affirm that order. We find that amending the section 300 petition to add a jurisdictional allegation pursuant to section 300, subdivision (b) as to Father, without giving Father notice or an opportunity to defend, violated Father's due process rights and should be reversed. Father claims that the dispositional order erroneously refused to give custody of his daughter to him, but substantial evidence supports that custody determination. Father also claims that the juvenile court erroneously failed to order that he receive financial assistance for housing, but Father forfeited this claim on appeal by failing to raise it before the juvenile court. We find that the juvenile court's visitation order requiring monitored visits for Father twice per week was not an abuse of discretion. We affirm the jurisdictional order sustaining section 300, subdivision (j) jurisdiction as to Mother, reverse the jurisdictional order sustaining section 300, subdivision (b) jurisdiction as to Father, and affirm dispositional orders regarding custody and visitation.

FACTUAL AND PROCEDURAL HISTORY

Detention: Three days after T.D.'s birth, a CSW received a referral alleging substantial risk to T.D., with D.D. (Mother) as the alleged perpetrator. When the CSW contacted Mother, she acknowledged prior DCFS cases. Mother's other cases included an open court case for her daughter K.W., nearly three years old, who while in Mother's custody was physically abused by someone in the home, causing non-accidental injuries including numerous burn injuries and a spiral femur fracture in her left leg. Mother had an open permanent placement case for her children T.L., nearly four years old, and TQ. L., 20 months old. It was later learned that K.W.'s adoption was finalized on

¹ Unless otherwise specified, statutes in this opinion will refer to the Welfare and Institutions Code.

February 16, 2007. Mother's parental rights to T.L. and TQ.L. were terminated on July 18, 2007, and T.L. and TQ.L. were to be adopted soon.

Mother blamed her mother and the father of T.L. and TQ.L. for injuries to K.W. and for Mother not being able to regain custody of her children. Mother said paternal grandmother made up lies against her and blamed the juvenile court judge for terminating parental rights. Mother said she complied with DCFS requirements, never hurt her children, and was a good mother. A CSW assigned to T.L. and TQ.L., however, said that Mother had not regained custody because she did not comply with court orders, lacked parenting skills, and was inappropriate during visits. T.D. was placed in temporary custody and remained in the hospital due to respiratory problems.

Petition: On October 24, 2007, the DCFS filed a section 300 petition alleging that pursuant to subdivision (j), T.D.'s siblings had been abused or neglected.

Detention Hearing: On October 24, 2007, the juvenile court found that a prima facie case was established for detaining T.D. as a person described by section 300, subdivisions (b) and (j). Mother identified T.D.'s father as L.R., Jr. (Father). The juvenile court ordered T.D. detained in hospital shelter care, ordered medical services for T.D., ordered monitored visits for Mother at least twice per week and for Father at least once per week when T.D. was out of the hospital, and set the matter for a November 19, 2007, pretrial resolution conference.

On November 19, 2007, Father filed a statement that he believed he was T.D.'s parent and requested entry of a judgment of parentage. Father had signed a declaration of paternity at the hospital. Mother also said that T.D. was Father's child. Father stated that he had known Mother for a year, and they planned on remaining a couple. Father said he had encouraged Mother to attend classes and counseling. He admitted that what happened to Mother's older three children was not good, but had no concerns about Mother as a parent and stated that she would be a good mother to T.D. Father lived with his grandmother and uncles and stated that he would like to have T.D. with him. Father, however, had not responded to the CSW's request that he provide the names and birthdates of relatives he lived with. Therefore criminal backgrounds checks of those

relatives could not be completed and Father's home could not be cleared as a possible home for T.D.

Father was unemployed and looking for work. He had a 10-year-old child, who lived with his mother. Father had no prior DCFS involvement. He stated that he desired custody of T.D.

T.D. remained in the hospital. She had surgery on October 31, 2007, an "esophagogastroduodenoscopy with biopsies from the duodenum, antrum, and distal esophagus." T.D. was diagnosed with "Stridor, upper gastrointestinal bleed; self limited, gastroesophageal reflux symptoms." T.D. had no discharge date.

The DCFS was not able to evaluate Father or his home for safety. Hospital staff observed Father speak harshly and inappropriately to Mother during a hospital visit with T.D., and was reported speaking with a threatening voice and a scowl on his face. Mother denied any domestic violence between Father and herself, and stated that while Father's facial expression might look mean, he was a good person and was not controlling or abusive toward her.

In the November 19, 2007, hearing, the juvenile court found Father to be the presumed father of T.D. The juvenile court denied Father's request to release T.D. to him, made an order that the parents could visit T.D. as often as the hospital would allow, with Mother's visits to be monitored, and granted Father at least three monitored visits per week with T.D., with the DCFS having discretion to lift the monitor on Father's visits if Father can protect T.D. from Mother. The juvenile court ordered the parents to receive any training the hospital offered as to the care of T-Q. when she was released from the hospital. The juvenile court ordered Father to participate in parenting class and counseling, and set the matter for a contested adjudication hearing on December 17, 2007.

Adjudication: As of December 17, 2007, T.D. remained in the hospital with no expected release date. A hospital nurse reported that it was likely that T.D. would require a feeding tube, as T.D. was not feeding on her own with a bottle and failure to eat was T.D.'s main issue. T.D. also vomited occasionally after eating. Nonetheless T.D.'s

weight was good, she was alert, and she smiled when talked to. The nurse stated that T.D. would need long-term medical care after discharge from the hospital, would need a feeding tube, and would have many doctor's appointments. Her caregiver would have to know how to use and care for the tube, and if T.D. went to a foster home, it would need to be a medical placement. The nurse reported that Mother and Father did not visit T.D. regularly, and except for the previous two or three days, Mother and Father called to check on T.D. less than every other day. In the previous three days, records showed no visits by Mother or Father. The nurse had not seen T.D.'s parents visit her in the previous month. The DCFS was still unable to evaluate Father and his home for safety and possible release of T.D., because Father had not provided information about the adults living in his house and those adults had not made themselves available for criminal history searches and background checks. Father was reported to be living in a converted garage on the property of his grandmother's home, and it could not yet be determined whether this was a safe place to house an infant with medical problems. Father rarely visited T.D. in the hospital, had limited contact with hospital staff caring for T.D., and had not received training in caring for T.D.'s needs. Father was not in contact with the DCFS.

On December 11, 2007, Father told a CSW, regarding his visits to T.D., "I haven't been able to make it up there" and said he had not visited T.D. since November 19, 2007. As he did not work or attend school, Father had time to visit T.D. Father lived only seven miles from the hospital where T.D. remained, and transportation funds had been obtained for Father. Two CSW's emphasized to Father the importance of visiting T.D. to bond with her and to learn from hospital nurses how to care for her medical needs. On December 12, Father arrived at the hospital during the last five minutes of Mother's monitored visit and held T.D. for two minutes before the visit ended.

Father provided information on adults in his residence so the DCFS could check criminal backgrounds. One adult at Father's address, whom Father identified as someone who would help care for T.D., had a conviction for willful cruelty to a child.

On December 13, 2007, a CSW assessed Father's home. Father lived in a garage, partially converted into a room, whose ceiling was open to the rafters. Father reported he was repairing the roof. Upon entering Father's garage, the CSW noticed a swarm of flies in the center of the room. Father slept on a mattress on the concrete floor. Mother was reported to sleep frequently at Father's residence. The garage had no heat, running water, gas, or electricity. Father said he used the main house for his bathroom, shower, and cooking. The CSW met Father's grandmother, aunt, and brother. At this time the CSW detected an odor of marijuana, whose source she could not identify. When the CSW entered the house, she noticed an unpleasant odor, and the house smelled unclean with a strong smell of unpleasant body odor. In the kitchen, cockroaches came out of a bowl of old food and crawled on kitchen walls. Kitchen tiles were extremely dirty and the walls appeared to have caked-on dirt. When the CSW entered the living area, an elderly man on the couch smoking a cigarette asked, "Who the fuck are you?" and why the CSW was in the home, and continued to curse to himself, stating "ain't no fucking baby coming to live here." The CSW observed more roaches on the walls of the living area and throughout the home. The CSW did not believe it would be in T.D.'s best interests to be released to Father due to the unsafe living conditions in his dwelling.

Father agreed with the DCFS that it would be best to discharge T.D. to a medical placement that could best care for her medical needs.

The contested adjudication hearing was continued to December 19, 2007. The juvenile court made the following visitation order: "While the baby is in the hospital, the parents may visit as often as the hospital will allow (Mother's visits are to be monitored by someone other than Mother)." The juvenile court continued the matter to December 20, 2007, because Mother's attorney was not available. Mother's attorney was still unavailable on December 20, so the matter was continued to January 22, 2008.

January 22, 2008, Adjudication and Disposition Hearing: For this hearing the DCFS reported that T.D. remained in the hospital with no release date. A hospital social worker reported that upon release T.D. would require placement in a home with medical equipment. T.D. was diagnosed with stridor, laryngomalacia, and gastrointestinal reflex,

and via G-tube required Reglan and Erythromycin every six hours and Prevacid every 12 hours. T.D.'s caregiver would have to administer tube feedings and medications and to monitor T.D. for possible choking which could occur if fluid went in too fast and backed up in T.D.'s throat. The caregiver would also have to perform daily wound care around the site of the tube insertion and to be CPR certified.

A hospital social worker reported that Father appeared at the hospital on Christmas Eve without a monitor. Although it was not her duty, the hospital social worker monitored the visit, and reported that Father was appropriate with T.D. and expressed interest in the child and in her care. The hospital worker told Father he could contact her to make an appointment with an educator to care for T.D.'s needs.

On January 9, 2008, the DCFS informed Father he could have unmonitored visits with T.D. while she was in the hospital. On January 17, 2008, Father reported that he had visited T.D. twice a week since January 9 or 10, 2008. The hospital social worker confirmed that she saw Father visiting T.D. more frequently, and he was very appropriate with her. She reported that both parents made more efforts to be involved with T.D. A CSW offered Father referrals to community resources such as a parenting class, but Father said he already had referrals. Father stated that he had not looked into any training to learn to care for T-O; the hospital made such training available.

At the January 22, 2008, hearing, Father's attorney stated that there was no waiver on behalf of Father, a non-offending parent, who did not agree with the case plan. Counsel stated that Father would try the case by argument but would not call witnesses. Father's counsel requested that the juvenile court not find jurisdiction over T.D. The juvenile court asked if Father was prepared to take a special-needs child into a DCFS-approved home. Father's counsel responded that Father "would happily bring the child in his home." Father had called the hospital about the class, but was told that the hospital would not give the class until T.D. was ready to be discharged. The juvenile court referred to information that Father did not live in an approved home, was not enrolled in services, declined to accept referrals because he already had them, and believed it was in T.D.'s best interest to move to a medical placement where she would receive medical

care. The juvenile court confirmed that Father lived in a garage with no heat, running water, gas, or electricity.

The juvenile court found by a preponderance of the evidence that T.D. was a child described under section 300. The juvenile court struck a section 300, subdivision (b) allegation as to Mother from the petition, but sustained the section 300, subdivision (j) allegation as to Mother. Pursuant to section 348, the juvenile court added a section 300, subdivision (b) count as to the Father, stating that Father was unable to provide proper care, custody, and control in that he did not live in appropriate housing for a special-needs child. The juvenile court declared T.D. a dependent child of the court pursuant to section 300, subdivisions (j) and (b), and ordered care, custody, and control of T.D. with the DCFS. The juvenile court ordered the DCFS to provide family reunification services for both Mother and Father, ordered monitored visits for the parents at least twice per week, and ordered unmonitored visits in T.D.'s placement after T.D. was released from the hospital.

Appeal: Father filed a timely notice of appeal from orders amending the petition to include new allegations against Father and sustaining those allegations.

ISSUES

Father claims on appeal that:

1. The juvenile court's amendment of the petition to conform to proof deprived Father of due process, and requires reversal;
2. Substantial evidence does not support the jurisdictional count as to Father;
3. The juvenile court lacked clear and convincing evidence necessary for its dispositional orders made as to Father, and prejudicially erred in failing to place T.D. with Father and in providing Father with adequate services;
4. The juvenile court's visitation order violated Father's due process rights.

DISCUSSION

1. *Amendment of the Petition to Allege Section 300, Subdivision (b) Jurisdiction as to Father Violated His Right to Due Process, Requiring Reversal, But the Juvenile Court Properly Assumed Jurisdiction Pursuant to Section 300, Subdivision (j) as to Mother*

Father claims that amendment of the petition by adding a jurisdictional allegation pursuant to section 300, subdivision (b) as to Father deprived him of due process, because he had no notice or opportunity to defend against that jurisdictional allegation.

Section 348 makes provisions of Chapter 8 (commencing with Section 469) of Title 6 of Part 2 of the Code of Civil Procedure applicable to petitions and proceedings under Chapter 2 of Part 1 of Division 2 of the Welfare and Institutions Code, “to the same extent and with the same effect as if proceedings under this chapter were civil actions.” (§ 348.) “The basic rule from civil law . . . is that amendments to conform to proof are favored, and should not be denied unless the pleading as drafted prior to the proposed amendment would have misled the adversarial party to its prejudice.” (*In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1042.) “If a variance between pleading and proof . . . is so wide that it would, in effect, violate due process to allow the amendment, the court should . . . refuse any such amendment.” (*Id.* at pp. 1041-1042, fn. omitted.) Where the variance between the petition and proof offered at the jurisdictional hearing is so great that the parent is denied constitutionally adequate notice of the allegations against him, the juvenile court should refuse to allow an amendment to conform to proof and this court should entertain a challenge to the sufficiency of the petition even if it was not raised below. (*In re David H.* (2008) 165 Cal.App.4th 1626, 1640.)

Here, the petition as originally filed did not provide adequate notice of the factual allegations against Father. (See *In re Athena P.* (2002) 103 Cal.App.4th 617, 626-627.) Indeed, it contained no allegations whatsoever against, and made no mention of, Father. The allegation of the petition pursuant to section 300, subdivision (b) (which the juvenile court dismissed) alleged that Mother had failed to protect T.D.’s eldest sibling, K.W. who had suffered numerous severe, non-accidental injuries while in Mother’s care and

custody; that Mother failed to comply with juvenile court orders; and that T.D.'s three older siblings received permanent placement services due to K.W.'s injuries sustained while in Mother's care and custody. The allegation of the petition pursuant to section 300, subdivision (j) (which the juvenile court sustained) contained these same allegations, and alleged that T.D.'s sibling was abused or neglected and there was a substantial risk that T.D. would be abused or neglected. Thus the petition alleged no facts upon which to base removal of a child from Father's custody. The facts alleged in the petition related to Mother's care and custody of her other children, to whom Father was not related and of whom he never had custody. Father had no notice of the specific facts upon which the petition was based, and thus was unable to meet the charges properly, which violated his due process rights. (*In re Jeremy C.* (1980) 109 Cal.App.3d 384, 397.) A supplemental petition pursuant to section 342 should have been filed to allege the new jurisdictional basis. The jurisdictional finding as to Father pursuant to section 300, subdivision (b) should therefore be reversed.

The juvenile court, however, retains jurisdiction under the other sustained jurisdictional allegation pursuant to section 300, subdivision (j), as to Mother. A minor is a dependent if either parent's actions bring the child within a statutory definition of a dependent; "a jurisdictional finding good against one parent is good against both." (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397.)

The order sustaining the petition alleging section 300, subdivision (j) jurisdiction as to Mother is affirmed. The order sustaining the petition, as amended, alleging section 300, subdivision (b) jurisdiction as to Father is reversed.

2. *The Dispositional Order Should Be Affirmed as to Custody But Reversed as to Visitation*

Father makes two challenges to the dispositional orders.

a. *Father Has Not Shown Error in the Dispositional Order Refusing to Place T.D. in Father's Custody*

Father claims that the DCFS failed to establish, by clear and convincing evidence, that placing T.D. with Father would be detrimental to the child if the DCFS provided Father with services and funding it was willing to provide foster parents.

i. *Substantial Evidence Supports the Juvenile Court's Finding That Placement With Father Would Be Detrimental to T.D.'s Safety, Protection, or Physical or Emotional Well-Being*

Section 361.2, subdivision (a) states: "When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."

The juvenile court must make a finding that placement with a non-custodial parent would be detrimental to the child's safety, protection, or physical or emotional well-being by clear and convincing evidence. (*In re John M.* (2006) 141 Cal.App.4th 1564, 1569.) We review the record in the light most favorable to the court's order to determine whether substantial evidence supports the juvenile court's finding that the child would suffer such detriment. (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426.)

Father's desire to assume custody of T.D. was equivocal. Twenty days after T.D.'s birth, he stated he desired custody of T.D. Two months after T.D.'s birth, however, Father said he believed it would be in T.D.'s best interests to place her in a medical placement after discharge from the hospital, and he could "get her later" when she did not have so many medical needs. Father agreed that T.D. should be placed in a

medical placement for her medical needs. At the dispositional hearing, Father's counsel stated that Father would happily bring T.D. into his home.

Even assuming that Father adequately stated his desire to take custody of T.D., ample evidence supported the juvenile court's finding that placing T.D. with Father would be detrimental to T.D.'s safety, protection, or physical or emotional well-being. Father's residence was unsafe and unsuitable for an infant, especially one with special medical needs. Father lived in a partially converted garage, with a concrete floor and only a mattress to sleep on. The garage had no heat, running water, gas, or electricity, and had no bathroom, showering, or cooking facilities. The main house had cockroaches, was dirty, and smelled unclean. One adult living in that house, whom Father identified as someone who would help him care for T.D., had been convicted of willful cruelty to a child. Another resident of the house rejected the idea of a baby living there. Father had taken no steps to acquire the training needed to care for T.D.'s special medical needs, which included administering tube feedings and medications, monitoring T.D. for possible choking, performing daily wound care around the site of the tube, and becoming CPR certified. Substantial evidence supports the juvenile court's finding that placement with Father would be detrimental to T.D.'s safety, protection, or physical or emotional well-being.

ii. *Father Forfeited His Claim on Appeal By Failing to Seek an Order in the Juvenile Court That He Receive Financial Assistance*

Father argues that the juvenile court erroneously failed to order that he receive financial assistance comparable to financial support provided to non-related foster caretakers.

Father did not request financial assistance for housing in the juvenile court. For that reason he has forfeited this claim of error on appeal. (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 813.) We find no error in the dispositional order.

b. *The Visitation Order Was Not an Abuse of Discretion*

Father claims that the juvenile court violated his right to due process by restricting his visitation to monitored visitation, without a section 388 petition from the DCFS, with

no showing that a change of circumstances justified the restriction on visitation, and with no consideration of T.D.'s best interests.

i. *Visitation Orders*

At the October 24, 2007, detention hearing, the juvenile court ordered monitored visits for Father at least once per week when T.-O. was out of the hospital.

At the November 19, 2007, hearing, the juvenile court ordered that Father have at least three DCFS-approved monitored visits per week, with the DCFS having discretion to lift the monitor on his visits if he could protect T.D. from Mother.

At the December 19, 2007, hearing, the juvenile court ordered that Father (and Mother) could visit as often as the hospital would allow, but ordered that Mother's visits were to be monitored.

On January 9, 2008, the DCFS informed Father that he could have unmonitored visits with T.-O. while she remained in the hospital.

At the January 22, 2008, hearing, Father's counsel requested unmonitored visits for Father as long as visits did not occur with Mother. The juvenile court ordered monitored visits for both Mother and Father at least twice per week, with more visits if allowed by the hospital. The juvenile court also ordered that once T.D. was released from the hospital, Father could have unmonitored visits in placement. The juvenile court gave the DCFS discretion to increase time and duration, but the DCFS could not lift the monitor without juvenile court approval.

ii. *The January 22, 2008, Visitation Order Was Not an Abuse of Discretion*

Father argues that the juvenile court violated his due process rights at the January 22, 2008, dispositional hearing by restricting Father's unmonitored visitation by ordering monitored visitation without notice or any explanation.

Section 362, subdivision (a) states: "When a child is adjudged a dependent child of the court on the ground that the child is a person described by Section 300, the court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child" More specifically, Section 362.1 requires the juvenile court, when making an order placing a child in foster care and ordering

reunification services, to provide for visitation, “as frequent as possible, consistent with the well-being of the child.” (§ 362.1, subd. (a)(1)(A).) “No visitation order shall jeopardize the safety of the child.” (*Id.* at subd. (a)(1)(B).)

Thus the juvenile court has the power to regulate visitation between parents and minors who are determined to be dependent children. (*In re Jennifer G.* (1990) 221 Cal.App.3d 752, 756.) “[T]he power to decide whether *any* visitation occurs belongs to the court alone.” (*In re S.H.* (2003) 111 Cal.App.4th 310, 317.) The juvenile court must define the parties’ rights to visitation, and must balance the parent’s interest in visitation with the child’s best interests. (*In re Jennifer G.*, *supra*, at p. 757.) “In balancing these interests, the court in the exercise of its judicial discretion should determine whether there should be any right to visitation and, if so, the frequency and length of visitation. The court may, of course, impose any other conditions or requirements to further define the right to visitation in light of the particular circumstances of the case before it.” (*Ibid.*)

“ ‘The juvenile court has broad discretion to determine what would best serve and protect the child’s interest and to fashion a dispositional order in accordance with this discretion. [Citations.] The court’s determination in this regard will not be reversed absent a clear abuse of discretion. [Citation.]’ ” (*In re Neil D.* (2007) 155 Cal.App.4th 219, 225.) The reviewing court must consider all the evidence, draw reasonable inferences, and resolve evidentiary conflicts in the light most favorable to the juvenile court’s ruling. The test is whether any rational trier of fact could conclude that the visitation order advanced the child’s best interests. This court must uphold the ruling if it is correct on any basis, regardless whether it is the ground on which the trial court relied. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

In light of the juvenile court's broad discretion to determine whether visitation will occur and to impose conditions on such visitation, we find no abuse of discretion in the change from unmonitored to monitored visitation. T.D. had special medical needs and had to remain in the hospital. Father had not yet learned to care for her special medical needs and had taken no steps to meet with an educator. Father had not enrolled in a parenting class even though he stated that he already had referrals to those classes. Father's housing was inadequate and unsuitable for the care of T.D. We find that the juvenile court's visitation order was not an abuse of discretion.

DISPOSITION

The order finding jurisdiction as to the Father based on an allegation pursuant to section 300, subdivision (b) is reversed. The order finding jurisdiction as to Mother based on section 300, subdivision (j) is affirmed. The dispositional order refusing to place T.D. in Father's custody is affirmed. The dispositional order of January 22, 2008, requiring monitored visits for Father twice per week is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.